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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

NO. 1025

ARTHUR KIRKORIAN,
Petitioner

vs.

STATE OF MARYLAND
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland entered in the above entitled cause on January 24, 1964, affirming the judgment of the Criminal Court of Baltimore City in finding the Petitioner guilty of the common law misdemeanor of indecently exposing "his private parts, to the common nuisance of all the people", as charged in Indictment 1511 of 1962, and as tried before a jury.

CITATIONS TO OPINION BELOW

The Opinion of the Court of Appeals of Maryland is reported at 233 Md. 324, 196 A2d 866, and is set forth in the Appendix, *infra* at pp. 1a to 5a.

JURISDICTION

The final judgment of the Court of Appeals of Maryland, the court of last resort of that State, filed January 24, 1964, was entered by way of filing of the Opinion of the Court, affirming the judgment below, on January 24, 1964 (Clerk's certificate attached hereto, *infra*, App. 5a). Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1257 (3), there having been asserted below and there being claimed here, denial of rights, privileges, and immunities secured by the Fourth, Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States. The highest court of the State of Maryland, in its decision ruled upon these said matters of denial of rights, privileges and immunities unfavorably to the Petitioner.

QUESTIONS PRESENTED

I. Was the Petitioner denied Due Process of Law as defined under the Fourteenth Amendment to the United States Constitution by

A. The Trial Court's clearly erroneous and highly prejudicial statement to the jury that "*I have the right to tell you, and I do tell you that this is a violation of the Common Law.*"

B. By persistent failure of the Trial Court to make any rulings at all on various objections made by counsel for the Petitioner, and by the Court's having, in some instances, gone so far as to allow its rulings to be made by the prosecutor.

C. The cumulative combination of I.A and I.B, if those were not severally a denial of due process.

II. In view of the announced declaration of the Maryland Legislature that indecent exposure in public waiting

rooms and public conveyances shall subject the offender to a maximum penalty of a $50 fine, or in default of payment thereof, of sixty days in jail, then was the sentence of two years in prison, inflicted on the Petitioner for indecent exposure upon a public street, a cruel and unusual punishment in violation of the Eighth Amendment to the Federal Constitution as made applicable to the States by the Fourteenth?

III. When the Petitioner was arrested illegally, and placed in a lineup immediately, was the evidence which was thereby generated, the "fruit of an illegal arrest", which was then used against the Petitioner in violation of rights guaranteed to him under the Fourth and Fifth Amendments to the Federal Constitution as made applicable to the States by the Fourteenth?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The case involves the following:

1. A portion of the Fourteenth Amendment to the Constitution of the United States:

> "... No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within it jurisdiction the equal protection of the laws."

2. A portion of the Fourth Amendment:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, ..."

3. A part of the Fifth Amendment:

"... nor shall (any person) be compelled in any criminal case to be a witness against himself ..."

4. And of the Eighth:

"... nor (shall) cruel and unusual punishments (be) inflicted."

5. Also, by way of comparison, on the cruel and unusual punishment question, part of Article 27, Section 122 of the Annotated Code of Maryland (Michie, 1957):

"Any person who shall be found drunk or acting in a disorderly manner to the disturbance of the public peace, or who shall wilfully act in a disorderly manner by making loud and unseemly noises or by profanely cursing, swearing or using obscene language, or by indecently exposing his person on or about any steamboat wharf, dock or public waiting room, or in or about the station grounds of any railroad in the State, or in any steamboat, streetcar, electric car, railroad car, passenger train or other public conveyance, or who shall wilfully catch hold of and solicit persons against the will of said persons, or obstruct their free passage to or through or out of such steamboat wharves, docks, public waiting rooms, (etc. aforesaid), shall upon conviction thereof, *be sentenced to a fine of not less than five dollars nor more than fifty dollars and costs*, and when such fine and costs are not paid, the party shall be committed *for not less than seven days or more than sixty days* to the city or county jail ..." (Laws of Maryland 1961, Ch. 616, Sec. 7.) (Emph. supp.)

6. Rule 756 b and 756 g, of the Maryland Rules of Procedure, Annotated Code of Maryland (Michie) 1957, Vol. 9B:

"b. The Court may and at the request of any party shall, give such advisory instructions to the jury *as*

may correctly state the applicable law; the Court may give its instructions either orally or in writing. The Court need not grant any requested instruction if the matter is fairly covered by the instructions actually given. The Court shall in every case in which instruc- they are the judges of the law, and the court's instructions are advisory only. (Emph. supp..)

"g. Upon appeal a party assigning error in the instructions may not assign as of right an error unless (1) the particular portion of the instructions given or the particular omission therefrom or the particular failure to instruct was distinctly objected to before the jury retired to consider its verdict and (2) the grounds of objection were stated at that time. Ordinarily no other error will be considered by the Court of Appeals but the Court of Appeals either of its own motion or upon the suggestion of a party *may take cognizance of and correct any plain error in the instructions, material to the rights of the accused*, even though such error was not objected to as provided by section f of this Rule." (Emph. supp..)

STATEMENT OF THE CASE

On April 5, 1962, two teen-age girls were on their way to junior high school together at about 9:30 A.M. They said that they passed a blue car which was parked on the same side of the street as that upon which they were walking, and in it saw a man seated in the front seat, (Appellant's App. below, pp. E. 3, 9, 10), who was indecently exposing himself. A third young girl testified (Appellant's App. below, pp. E. 11-12) to a similar experience at the same place at a slightly earlier time on the same day. None of the three stopped or lingered (Appellant's App. below, pp. E. 3, 9, 10; T. 7). One of the three testified to a second

incident the following day, but the Appellant was not charged with any offense on that day. About a week later one of these witnesses, while being driven to school by her mother, thought she saw the same car, parked now a block or so away from where the first incident had occurred (Appellant's App. below, pp. E. 4-5). She noted down the license number (Appellant's App. below, pp. E. 5), and thereafter the Defendant was arrested at his home, without a warrant, and without even being informed what it was that he was being taken to a police station for (Appellant's App. below, pp. E. 8). He was at once placed in a lineup with a number of other men who were "grubby and dishevelled" (Appellant's App. below, pp. E. 9), or "kind of sloppy" (Appellant's App. below, pp. E. 11), or "(dressed) very sloppily. Shirt-tail out and everything else" (Appellant's App. beow, pp. E. 13), while the Appellant was apparently dressed much better, and perhaps very differently from the others (see Appellant's App. below, pp. E. 13). However, this matter is not extractable from the Record, for the Court disallowed inquiry into it (Appellant's App. below, pp. E. 13).

At any rate, the Appellant was picked out of the "lineup" by each of the girls who testified, and on the basis of this, of other idenfification testimony of the same witnesses, of testimony of the corpus delicti by each, and in the face of his own denial (Appellant's App. below, pp. E. 15), and of testimony of his brother that he had not left their common abode until after the events were alleged to have occurred (Appellant's App. below, pp. E. 13-14), the Petitioner was nevertheless convicted.

AS TO WHETHER THE FEDERAL QUESTIONS WERE TIMELY AND PROPERLY RAISED (SUPREME COURT RULE 23-1 (f))

The Petitioner through his counsel, raised five questions in the State Appeals Court below, all of which were, according to the Court "without merit" (App., 1a).

Four of these "without merit" questions are again raised here, in the order in which counsel obstinately believes that if justice is justice, they may indeed have, both merit and substantiality.

Question I.A. (of "Questions Presented", supra) was the question of denial of due process by virtue of the Trial Court having stated to the jury that

> "I have the right to tell you and do tell you, this is a violation of the Common Law."

No objection was made or exception taken to this instruction by then counsel below, but the Maryland Rules of Procedure contain a saving clause in Rule 756 g. (Annotated Code of Maryland (Michie) 1957, Vol. 9B),

> "Upon appeal a party . . . may not assign as of right an error in the instructions (to the jury) unless . . . the grounds of objection were stated at the time. Ordinarily no other error will be considered by the Court of Appeals, but the Court of Appeals either of its own motion or upon the suggestion of a party may take cognizance of and correct *any plain error in the instructions, material to the rights of the accused even though such error was not objected to* . . . (Emph. supp.).

The Petitioner's suggestion that the instruction ("this is a violation of the Common Law", supra.), amounted to a denial of due process was held to be "all without

merit" (App. 1a) by the Court of Appeals for the reason that,

> "We think it obvious from the context that the meaning of the disputed sentence was '. . . this (the offense of indecent exposure) is a violation of the common law' i.e. that the appellant was *charged* with a violation of the common law. We do not think that there was *room* for the jury to be mislead . . ." (Emph. supp. but brackets are the Court's.) (App. 4a).

Counsel at this point in this Petition has some difficulty refraining from offering argument. But the context is given in the opinion below (App. 4a) as follow:

> . . . We have statutory laws in some cases, and in this case we are dealing with what I previously explained to you, an offense under the common law, and you do not ignore or overlook that, but it is your function to determine whether or not that law applies or whether that should be the law of the particular case you are hearing. I HAVE THE RIGHT TO TELL YOU AND I DO TELL YOU, THIS IS A VIOLATION OF THE COMMON LAW." (Emph. supp.).

Question I.R., denial of due process by persistent failure of the Court to itself rule on trial counsel's objections on admissibility was likewise raised on appeal under Maryland Rule of Procedure 756 g as a "plain error material to the rights of the accused", but the Court of Appeals stated that due process was not denied as

> "In each instance the State's Attorney immediately instructed the witness not to state what other people had said. Thus, the purpose of the objection was fulfilled and no prejudice resulted." (App. 2a).

Question II concerned the legality of the sentence of two years which was imposed, *vis a vis* the Eight Amendment. It was raised, for the first time, as it is believed it could only have been, upon appeal. No question of timeliness was raised below by the Respondent. The Maryland Court held (App. 1a),

> "Here it does not appear that the sentence was an abuse of discretion or cruel or unusual under the circumstances present."

Finally, Question III suggests that the "lineup" evidence was the fruit of an illegal arrest, and so should have been excluded below. Unfortunately, this, the best of questions, was not raised in the trial Court at all. The Maryland Court held (App. 2a) that "These questions are not properly before us", and Petitioner can only rely now, as he did in the Court of Appeals, on the rationale of uselessness to raise the question below, as was done in *Mapp* v. *Ohio*, 367 U.S. 643, 81 S. Ct. 1692 and in *Hall* v. *Warden, Maryland Penitentiary*, 313 F.2d 483 (C.C.A. 4, 1963) cert. den. 374 U.S. 809, 83 S. Ct. 1693 wherein it was held to be "incredible that Hall would consciously and willingly have surrendered such a right . . . had he known then what he knows now." Argument on whether the question can be raised now appears at pp. 21-22 herein.

REASONS FOR GRANTING THE WRIT

This case involves substantial questions affecting important constitutional rights which it is believed have not heretofore been determined by this Court, or which were resolved by the Court below in a manner which is in conflict with principles expressed by this Court:

ARGUMENT

I.

THE PETITIONER WAS DENIED THE DUE PROCESS OF LAW GUARANTEED TO HIM BY THE FOURTEENTH AMENDMENT.

A.

BY THE COURT'S PREJUDICIAL INSTRUCTION TO THE JURY THAT "I HAVE THE RIGHT TO TELL YOU, AND I DO TELL YOU THAT THIS IS A VIOLATION OF THE COMMON LAW" WHEN THAT WAS THE VERY QUESTION OF FACT WHICH THE JURY WERE EMPANELLED TO DECIDE.

The due process requirement laid down by this Court requires something more than a mere salute in passing. Due process requires "fair play". *Galvan v. Press* 74 S. Ct. 737, 347 U.S. 522. It requires "essential justice", *Hysler v. Florida* 62 S. Ct. 688, 315 U.S. 411, 316 U.S. 642. It is "measured by . . . that whole community sense of decency and fairness that has been woven by common experience into the fabric of acceptable conduct." *Breithaupt v. Abram*, 77 S. Ct. 408, 352 U.S. 432. It "deals neither with power nor with jurisdiction, but with their *exercise*" *Kinsella v. U.S. ex. rel. Singleton* 80 S. Ct. 297, 361 U.S. 234. It demands that the law shall not be unreasonable, arbitrary and capricious: *Lapides v. Clark* 176 F2d 619, 85 U.S. App. D.C. 101, cert. den. 70 S. Ct. 101, 338 U.S. 860. Its "pervasive function . . . is to exact from the states observance of basic liberties. "*U.S. ex. rel. Darcy v. Handy* 203 F2d 407 (Penna.) cert. den. 74 S. Ct. 103.

Though the Maryland Court contended that the challenged phrase was innocuous, Petitioner argues, rather,

that it was language so far deviated from the circumspection and restraint called for in a jury charge, that even by the test of *Rochin v. California* it must overfall; that it "shocks the conscience" and offends "a sense of justice". *Rochin v. California* 342 U.S. 65, 164, 172, 173, 72 S. Ct. 205.

In *Mills v. Tinsley*, 314 F2d 311 (Colo. 1963), at 313 it was held that "To compel a jury to agree upon a verdict is a denial of a fair and impartial jury trial, and, hence, is a denial of due process."

The language here amounted to jury-forcing. It is respectfully urged, that there was, in fact, more. The portion of the instruction objected to is shown in context below, underlined. (The Maryland Court had charged that "Again the Appellant (s counsel) seizes upon one sentence and disregards the context in which it appears." App. 4a.):

> "Members of the Jury, I don't think I need tell you this, but I must, and that is in Maryland, unlike all other states with one possible exception, the Jury is the judge of the law and of the facts of any criminal case. That is why counsel may read to you from law books or law publications in a criminal case. You have been serving on civil juries. I don't know whether you have had any experience in any of the other parts of Criminal Court or not, but I'm sure you noticed in civil courts counsel do not read to you from any prior decision or textbook as you heard today. The reason for that is that you, in Maryland, are the judges of the law and of the facts in the case. In a civil case, at the end of the case you are told what the law is and you must accept and follow that law. You determine the facts in your sole discretion and apply the facts as you find them to the law of the case as the Judge gives it. Here you have the right to determine both the question of law and fact. That doesn't mean

to say there are not certain laws that apply; there are. We have statutory laws in some cases and in this case we are dealing with what I previously (T. 107) explained to you, an offense under the common law, and you do not ignore or overlook that, but it is your function to determine whether or not that law applies or whether that should be the law of the particular case you are hearing. *I have the right to tell you, and I do tell you, this is a VIOLATION of the Common Law.*

You have the right to ignore that. You are not required to follow that. You have the right to say, well, maybe that is right; maybe there are cases where that does apply, but it doesn't apply in this case we find it is not the law of this case. You make your decision consistent with your oath of office that you will well and truly try the case, to hear the evidence and return your verdict in accordance with that evidence." (Emph. supp.)

Can any construction *in* context or *out*, but particularly, *in*, be placed upon the italicized sentence other than that the Trial Court believed, that the Trial Court had concluded, on the evidence, that the Petitioner was guilty of the offense charged?

The Maryland Court thought it "obvious" from the context that "the meaning of the disputed sentence was, '. . . this (the offense of indecent exposure) (brackets by the Court) is a violation of the common law' i.e. that the appellant was charged with a violation of the common law. We do not think there was *room* for the jury to be misled . . ." (App. 4a) (Emph. supp.).

Was it so simple? If so, why the abstruse explanation (Note the arbitrary assignment of meaning given in brackets).

Is this antecedent, so gracefully framed by the brackets, anything but an arbitrary conclusion forced by the Court

from the words, as an interwedged square peg might, by pounding, be forced from a round hole?

It is respectfully urged that a reasonable construction produces at best ambiguity as to the Trial Court's frame of mind, and at worst, a clear picture of a judge who has definitely been able to make up *his* mind as to the construction to be put on the evidence (and to an unpracticed jury-see above where the jury is characterized as one which has been used to hearing civil cases, not criminal—p. 11 line 23.)

Such an instruction violates the holdings, the spirit, and the letter of the Maryland law, for while it is the Court's right to comment on the evidence, it is not the Court's function to make ultimate findings of fact, nor to impose its prejudices on the jury. The statement which was made goes far beyond the realm of comment, and no admonition later made that "You are not required to follow that. * * * You have the right to ignore that." can cure, or hope to cure, such a blandly self-satisfied remark of the Court that *it* has no difficulty, no doubt, in finding that an offense has been committed! The judge, as this learned Court well knows, sits his bench clothed in majesty, revered in awe by the jury, listened to with honor, accorded, in everything, great deference. This surely is a case where

> "The Moving Finger writes: and having writ,
> Moves on: nor all your Piety nor Wit
> Shall lure it back to cancel half a Line
> Nor all your Tears wash out a Word of it."

As was strongly understated in *Hardison v. State*, 226 Md. 62, "a statement or instruction of the trial judge carries with it the imprimatur of a judge learned in the law, and therefore usually has more effect than if merely presented by counsel."

In *Cochran v. State*, 119 Md. 555, it was held, "The instruction was not only too general, but it assumes as proved, facts which should have been submitted to the jury for them to find, and upon those segregated facts the Court practically directed a verdict of guilty". The case was reversed. The same sort of error, but of greater magnitude, it is respectfully contended, was committed in the instant case, yet the Court of Appeals of Maryland was audacious enough, it is respectfully argued, to afford the Petitioner no remedy. In the *Cochran* case, in reversing, the Court of Appeals stated, "We think the Court's instruction in this case was calculated to have prejudiced the jury in its finding and to prevent a fair and impartial verdict in the case, and without discussing it further, we hold that it was reversible error."

Surely the remark made here, likewise prejudiced the jury and prevented a fair and impartial verdict, and did so, in sufficient magnitude, it is suggested, to amount to a denial of due process.

QUESTION BELIEVED NOT TO HAVE BEEN RAISED BEFORE IN THIS COURT

Research appears to disclose no case in which the question of a like flagrant mis-statement of the law has been examined by this Court from the standpoint of the question of due process.

B.

BY PERSISTENT FAILURE OF THE TRIAL COURT TO MAKE ANY RULINGS AT ALL ON VARIOUS OBJECTIONS MADE BY COUNSEL FOR THE PETITIONER, AND BY THE COURT'S HAVING, IN SOME INSTANCES, GONE SO FAR AS TO ALLOW ITS RULINGS TO BE MADE FOR IT BY THE PROSECUTOR.

To certain objections of appellants counsel, no rulings at all were made by the court, nor were the jury told to disregard certain obviously objectionable material:

> "A. Well, after Margo Harris saw it (an indecent exposure, apparently) she told her mother.
>
> "(Mr. Daneman) Objection.
>
> "By Mr. Reamer:
>
> "Q. Don't tell us what she told her mother . . ."

(Appellant's Appendix below E. 3).

It is to be noted that the Court apparently allowed the prosecutor to rule on the objection, nor did the Court admonish the jury as it should have done, to ignore the remark.

At E. 10 (Appellant's Appendix below):

> "Q. When did you first talk to the police about this case? A. I think Mrs. Harris called.
>
> "(Mr. Daneman) Objection.
>
> "By Mr. Reamer:
>
> "Q. Don't tell us anything about what Mrs. Harris said to you. When did you first see the police?"

Again no instruction to the jury to ignore the evidence that Mrs. Harris called the police, quite clearly with the implication that she had called about the Appellant, and quite clearly with the implication that she had called about some crime committed by him.

At E. 12 (Appellant's Appendix below):

> "Q. And did you have a discussion about what you had seen? A. Yes, sir, she had previously . . .
>
> "(Mr. Daneman) Objection.
>
> "(Mr. Reamer) Don't tell us what she said."

On this occasion the witness didn't "tell us what she said", but is this due process of law, to leave the Appellant floundering with what help he can get from the prosecutor, while the Court refrains from exercising its function, and the jury is given the impression that as far as the Defendant is concerned, the Court does not care to help?

C.

BY THE CUMULATIVE COMBINATION OF I.A. AND I.B., IF THOSE WERE NOT SEVERALLY A DENIAL OF DUE PROCESS.

Taken of itself, I.B. supra, would probably not be enough to raise a substantial federal question of due process; I.A. supra, of itself, it is believed, would. At any rate, it is felt that the cumulative effect of I.B. added to I.A. was a terribly strong disadvantage for the accused to have to labor under—enough to constitute failure of due process; moreover, the two taken together amply indicated to the jury that the Court was undoubtedly on the side of the prosecution, and this would, it is respectfully urged, amount to a denial of due process.

QUESTION BELIEVED NOT TO HAVE BEEN RAISED BEFORE

It is believed that question I.B. also has never before been raised in this Court, and of course, its cumulation with I.A. has not.

II.

THE SENTENCE IMPOSED WAS EXCESSIVE UNDER THE EIGHTH AMENDMENT.

Indecent exposure is a common law misdemeanor. *Messina v. State*, 212 Md. 602, 130 A.2d 578. The General Assembly of Maryland, however, apparently out of a need to control it and other forms of disorderliness in privately owned public waiting rooms and conveyances, considered the seriousness of the offense and rendered its pronouncement that an appropriate punishment, commensurate with the evil, *was a fine of from five to fifty dollars*, or in default of payment of the fine, *a prison term of seven to sixty days*. Art. 27, Sec. 122, *Annotated Code of Maryland (Michie, 1957)*. In the *Messina* case, supra, it was held, after considering the purport of Art. 27, Sec. 122, that in almost identical circumstances to those found in the present case, a term of four months was not a cruel and unusual punishment.

It is respectfully urged, however, that two years is: It is more than *twelve times* the maximum amount the legislature would impose for a similar act in a similar public place. Though four months, as in the *Messina* case, need not be considered "beyond a reasonable discretion" (quoting from *Messina*), yet it seems that judging either by the Messina standard, or by the pronouncement of Sec. 122, twenty-four months *should* be so considered, and should have been so considered by the Court of Appeals.

By virtue of the Court of Appeals not having so considered the sentence, it is respectfully argued that the State of Maryland has deprived the Petitioner of his liberty without due process of law, by ignoring the mandate of the Eighth Amendment, which is made applicable to the States by the Fourteenth. *Robinson v. California*, 370 U.S. 660, 82 S. Ct. 1417, 1421, col. 1.

III.

PLACING AN ACCUSED IN A LINEUP IMMEDIATELY FOLLOWING AN ILLEGAL ARREST IS A VIOLATION OF A FOURTH AMENDMENT IMMUNITY MADE APPLICABLE TO THE STATES BY THE FOURTEENTH AMENDMENT.

This Court has prohibited the use of evidence gathered by state officials as a result of an illegal arrest. *Wong Sun v. U.S.* 83 S. Ct. 407, 371 U.S. 471, and see *Ker v. California*, 83 S. Ct. 1623, 374 U.S. 25.

In *Wong Sun* it was held that

> "The exclusionary prohibition extends as well to the indirect as the direct products of such invasions" (at 416)

and that

> "The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion. It follows from our holding in *Silverman v. United States*, 365 U.S. 505, 81 S. Ct. 679, 5 L. Ed. 2nd. 734, that the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of "papers and effects". Similarly, testimony as to matter observed during an unlawful invasion has been excluded in order to enforce the basic constitutional policies. *McGinnis v.*

United States, 227 F2d. 598. Thus, verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers' action in the present case is no less the 'fruit' of the official illegality than the more common tangible fruits of the unwarranted intrusion.

". . . (T)he danger in relaxing the exclusionary rules in the case of verbal evidence would seem too great to warrant introducing such a distinction."

NEVER DECIDED

It is believed that the question of placement of an illegal arrestee in a lineup has never been considered by any court in relation to the question of whether the evidence so obtained is the "fruit of the poisoned tree".

This Court laid down the test in *Wong Sun*, supra., at 83 S. Ct. 417,

"We need not hold that all evidence is the 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such case is 'Whether, granting establishment of primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint'. Maguire, Evidence of Guilt, 221 (1959)."

Nice questions are raised by placing an arrested person in a lineup, as here, of both Fourth Amendment violation of rights, and also of the Fifth Amendment privilege against self-incrimination.

OBJECTION NOT RAISED IN TRIAL COURT; EXCUSAL

Unfortunately, the Petitioner now finds his position on his right to raise the foregoing point, rather tenuous, due

to the fact that no issue was raised below, at trial, based upon the question of the illegality of the arrest. In the Court of Appeals, the Petitioner was therefore driven to argue on the basis of certain language in two cases of *Hall v. Warden*, infra, that because of the pre-*Mapp* (*Mapp v. Ohio* 81 S. Ct. 1684, 367 U.S. 643) view, such objection could have been, or was regarded by counsel as futile.

There can be no question but that the arrest of the Appellant was illegal (E. 8 Appellant's Appendix below):

> "Q. Did you obtain a warrant for his arrest? A. No, sir, we did not.
>
> . . . . . .
>
> "Q. When did you first come in contact with Mr. Kirkorian? A. When the Officer took him in custody outside of his home.
>
> "Q. What did you say to him? A. He wanted to know why he was being detained. I explained to him, we would give him a full outline at the Station."

Apparently, immediately upon arriving at the station house, the Petitioner was placed in a "lineup" (Appellant's Appendix below E. 8, 10).

No objection was made to the lineup evidence at the trial below. But in *Hall v. Warden, Maryland Penitentiary*, 313 F2d 483 (1963, C.C.A. 4), at page 496, col. 2, it was said,

> "(T)he Supreme Court had refused, time after time and over a long period of years, to require of the states the adoption of the *Weeks* exclusionary rule . . . (T)he failure of Hall to object to the admission of the fruits of the illegal search and to raise the question on appeal is not only understandable but excusable

. . . . It is incredible that Hall would consciously and willingly have surrendered such a right, which was undoubtedy violated, had he known then what he knows now."

In the *Hall* case a Petition for Certiorari was filed by the Attorney General of Maryland requesting a reversal, but the Petition was denied, 82 S. Ct. 78, 368 U.S. 867.

The fact that in the prior case of *Hall* v. *Warden*, 224 Md. 662, 168 A2d 373, in which this Court stated that the illegal search question could not be raised in a State Post Conviction Procedure action, was also denied certiorari, 368 U.S. 867, 82 S. Ct. 78, simply affirms the fact that state procedural requirements to raise or preserve the question may still be respected. *Porter* v. *State*, 230 Md. 535, 187 A2d 870, *Shorey* v. *State*, 227 Md. 385, 177 A2d 245. See also *Ker* v. *California*, 83 S. Ct. 1630 wherein it was stated that "The States are not . . . precluded from developing working rules governing arrest . . . ". In other words, the question in the state court, must be raised by appeal, according to the dictates of state procedure, and not by Post Conviction Proceedings. The Appellant uses appeal here, but invokes the reasoning of federal *Hall* (as to his excuse for not raising the question below).

It is true that the instant case was after *Mapp*. *Mapp* was decided in June, 1961; this case was heard below on December 5, 1962.

It is submitted that (a.) counsel below was not a specialist in the criminal law (note his failures to make objections based on *Mapp*, and other matters) and that therefore (b.) sufficient time had not elapsed since *Mapp* to allow the knowledge of its full significance to have spread to such a pratitioner, (c.) especially as to a matter-

evidence obtained as result of a "lineup" following an illegal arrest which was not directly treated of in *Mapp*.

NEVER BEFORE DECIDED

Petitioner admits the strain of this argument. However, the issue of *what may be done* after an illegal arrest (placement in a lineup is one such issue; what of questioning for a confession, fingerprinting, blood tests) is as important as the question of what may be seized or not seized. The question raised here is in a blank area, as to this Court's pronouncements; clarification of the subject would be of material aid to both law enforcement officials, and defense counsel of the criminal bar.

ON SUBSTANTIALITY

In his concurring Opinion in *Gideon* v. *Wainwright* 372 U.S. 349, 83 S. Ct. 792, 799, Mr. Justice Clark said (speaking of Gideon, deprived of his liberty for five years),

> "I must conclude here, as in *Kinsella*, supra (*Kinsella* v. U.S. 361, U.S. 234, 80 S. Ct. 297), that the Constitution makes no distinction between capital and non-capital cases. The Fourteenth Amendment requires due process of law for the deprival of "liberty" just as for deprival of "life", and there cannot constitutionally be a difference in the quality of the process based merely upon a supposed difference in the sanction involved. How can the Fourteenth Amendment tolerate a procedure which it condemns in capital cases on the ground that deprival of liberty may be less onerous than deprival of life—a value judgment not universally accepted—or that only the latter deprival is irrevocable? I can find no acceptable rationalization for such a result, and I therefore concur in the judgment of the Court."

Does not substantiality relate to the repugnance of what was done, rather than to the resulting harm to the Defendant? It is respectfully argued that it of course, does, and that any of the issues which are raised herein, on infringement of federal rights and immunities, are also, and are likewise, as substantial as were Gideon's.

CONCLUSION

Wherefore, for the foregoing reasons, it is respectfully urged that the Petition for a Writ of Certiorari be granted.

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APPENDIX

OPINION OF THE COURT OF APPEALS OF MARYLAND

The appellant, convicted of the common law misdemeanor of indecent exposure by a jury in the Criminal Court of Baltimore and sentenced to two years' imprisonment, now appeals.

Two teen-age girls testified that, while walking to school, they passed a blue automobile parked at the curb and saw a man seated in the front seat handling his exposed private parts. A third young girl testified to a similar experience earlier that day at the same place. The police were notified. A week later one of the girls, while being driven to school by her mother, saw the same man in the same car, parked about a block from where the incidents had occurred. She wrote down the license number, and later the appellant was arrested, without a warrant. In a police "lineup", he was identified separately by all three girls.

The appellant raises five contentions, all without merit. The first is that his sentence of two years was so excessive as to constitute cruel and unusual punishment, particularly in view of Code (1957), Art. 27, Sec. 122 (which provides that indecent exposure in a public waiting room or public conveyance shall be punished by maximum fine of fifty dollars, or default of payment, by a maximum prison term of sixty days). The offense charged here is not within the purview of the statute cited. Indecent exposure is a common law misdemeanor. In the case of common law crimes, the only restrictions on sentence are that it be within the reasonable discretion of the trial judge and not cruel and unusual punishment. *Messina* v. *State*, 212 Md. 602, 607, 130 A.2d 578 (1957). Here it does not appear that the sentence was an abuse of discretion or cruel or unusual under the circumstances present. *Delucgeo* v. *State*, 198 Md. 80, 88, 81 A.2d 241 (1951).

The second contention is that it was a violation of appellant's constitutional rights "to illegally arrest him, place him in a 'lineup', and then use the evidence thus made, against him at his trial". However, the record shows that counsel for the appellant (not the same as on appeal) failed to object to the line of questioning whereby the "lineup" identification was developed. Moreover, it was not contended below that the arrest was illegal. Thus these questions are not properly before us. Maryland Rule 885.

It is next urged that it was error and a denial of due process to prevent counsel from showing that the "lineup" was not fairly conducted. The three girls testified that at the "lineup" the appellant was dressed better than the other participants. Counsel for appellant then asked "So isn't it true it was rather easy to pick out a neatly dressed man?" An objection to this question was sustained. We cannot say that this was error since the proposed question, even if affirmatively answered, would fail to establish that the "lineup" was not fairly conducted. If counsel for appellant had wished to pursue further the question of the fairness of the "lineup", he should have followed up with other questions or at least made a proffer to show what he was attempting to prove and how he planned to prove it. *Humphreys* v. *State*, 227 Md. 115, 123, 175 A.2d 777 (1961). In any event there was no prejudice, since all three girls identified appellant at the trial.

The appellant also claims that the trial court's failure to rule on various objections was a denial of due process. The objections referred to were made to prevent the introduction of hearsay. In each instance the Assistant State's Attorney immediately instructed the witness not to state what other people had said. Thus, the purpose of the objections was fulfilled and no prejudice resulted.

Finally, the appellant asks us to invoke the discretion vested in us by Rule 756 g to take cognizance of and correct what he says are two instances of plain error

material to his rights in the court's advisory instructions to the jury, even though his trial counsel failed to object to the court's charge as given or to request any further instructions, as required by Rules 756 f and 885 to reserve such points on appeal.

The first instance deals with the court's instruction concerning the reason for the admission of the appellant's prior criminal record. The appellant cites, entirely out of context, the sentence italicized in the following quoted passage and argues that it violates the rule that previous convictions are admissible only to impeach the credibility of the defendant. However, the whole instruction on this point was as follows:

> "There has been some evidence in this case of prior offenses of the law committed by the defendant. You do not convict this man or any other man on the basis of prior offenses. He is not being tried for those prior offenses. He has been punished for them. The only reason that that is admissible and, therefore, called to your attention is that it may go to credibility: *Do those prior offenses indicate that the defendant had any reason for not telling you the truth.* As I say, it only goes to the question of credibility and not as to the question of guilt or innocence for this particular offense. (Emphasis supplied.)

We think the italicized rhetorical question, taken in context with the whole instruction, was at least not prejudicial to the appellant under the circumstances of this case. See *Taylor* v. *State*, 226 Md. 561, 566-567, 174 A.2d 573 (1961); *Jones* v. *State*, 229 Md. 472, 474, 184 A.2d 809 (1962); *Tull* v. *State*, 230 Md. 152, 156, 186 A.2d 205 (1962).

The appellant also contends that it was "plain error" for the trial judge to state, in the instructions, that "I have the right to tell you, and I do tell you, this is a violation of the Common Law." Again the appellant seizes upon one sentence and disregards the context in which it appears. At the time, the court was instructing

the jury as to the two types of violations—of the statutory law, and of the common law. The court had told the jury that it "is the judge of the law and of the facts of any criminal case". Then, immediately prior to the sentence complained of, the court said:

> "* * * We have statutory laws in some cases and in this case we are dealing with what I previously explained to you, an offense under the common law, and you do not ignore or overlook that, but it is your function to determine whether or not that law applies or whether that should be the law of the particular case you are hearing. * * *"

We think it obvious from the context that the meaning of the disputed sentence was, "* * * this (the offense of indecent exposure) is a violation of the common law," *i.e.* that the appellant was charged with a violation of the common law. We do not think there was room for the jury to be misled, and we find that the instruction, taken in context, was fair and proper. See *Jones* v. *State* and *Tull* v. *State*, both *supra*.

Hence, in neither instruction complained of do we find any plain error or any violation of the appellant's constitutional rights.

Judgment affirmed; Appellant to pay the costs.

STATE OF MARYLAND, Set:

I, J. Lloyd Young, Clerk of the Court of Appeals of Maryland, the highest Court of said State with final jurisdiction on appeals from the trial courts therein, do hereby certify that the foregoing are full and true copies of the documents, originals of which are on file in the office of said Clerk, in the appeal of *Arthur W. Kirkorian* v. *State of Maryland*, No. 126—September Term, 1963:

1. Joint Appendix, filed in this office on September 9, 1963.

2. Appendix of Appellee, filed in this office on October 25, 1963.

3. Opinion of the Court of Appeals filed on January 24, 1964.

IN TESTIMONY WHEREOF, I have hereunto set my hand as Clerk and affixed the seal of the Court of Appeals of Maryland this twelfth day of March, 1964.

J. LLOYD YOUNG, Clerk,
Court of Appeals of Maryland